U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 25 June 2003

CASE NO.: 2001-LHC-02408

OWCP NO.: 01-151418

In the Matter of

KEVIN L. KIRK
Claimant

v.

BATH IRON WORKS CORPORATION
Employer/Self-Insurer

Appearances:

Marcia J. Cleveland, Esquire, Topsham, Maine,
for the Claimant

Stephen Hessert, Esquire (Norman, Hanson &
DeTroy), Portland, Paine, for the Employer

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

This proceeding arises from a claim for worker's compensation benefits filed by Kevin L. Kirk (the Claimant) against the Bath Iron Works Corporation (BIW), under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (the Act). The Claimant seeks an award of temporary partial disability compensation for a one month period during September - October 2000 when he did not work at BIW while he was recovering from surgery for a work-related hand injury. BIW had been paying the Claimant temporary total disability compensation but suspended payments on September 25, 2000, after the labor organization representing the Claimant commenced an economic strike against BIW, on the ground that there was light duty work available to the Claimant on the other side of the picket line.

After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs (OWCP), the claim was referred to the Office of Administrative Law Judges for hearing. Pursuant to notice, a formal hearing which was conducted before me in Portland, Maine on February 4, 2002, at which time all parties were given the opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of BIW. The Claimant and a witness called by BIW testified at the hearing, and documentary evidence was admitted at the hearing without objection as Claimant's Exhibits ("CX") 1-13 and Employer's Exhibits ("EX") 1-37. Hearing Transcript ("TR") 14-16. At the close of the hearing, the record was held open to allow the parties time to submit written closing argument. Both parties filed helpful closing argument, and the record is now closed.

After careful analysis of the evidence contained in the record I conclude that the Claimant is entitled to an award of temporary total disability compensation for the disputed period as well as interest on the unpaid compensation and attorney's fees. My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

The parties stipulated that: (1) the claim is covered by the Act; (2) at all times material, the Claimant was an employee of BIW; (3) on May 15, 2000, the Claimant sustained an injury to his left hand which arose out of and in the course of his employment; (4) the Claimant's average weekly wage at the time of the injury was $618.19; (5) the Claimant underwent two different surgical procedures, one in August 2000 and the other occurred in June 2001, and he received payment from BIW for these procedures and disability compensation for time out of work. TR 8. The parties' stipulations are fully supported by the evidence of record, and I adopt them as my findings. The only issue presented is whether the Claimant is entitled to compensation for the period beginning September 25, 2000 through October 22, 2000 while he was out of work and had his compensation payments suspended by BIW during the strike. TR 8-9.

III. Findings of Fact and Conclusions of Law

A. Background and Summary of the Testimony

The Claimant is employed by BIW as a tinsmith. On May 15, 2000, while he was working aboard a ship under construction and pulling a welding cable onto a work site where he planned to tack weld a foundation, he felt a sharp pain in his left hand as though he had been stabbed with a sharp piece of metal. He looked at his hand but saw no blood, so he continued working. However, his hand later swelled, and the pain increased to the point where he reported the injury to the BIW Medical Department on May 16, 2000. TR 21-22; CX 12 at 1.[1] Over time, he

[1] Page citations to the Claimant's exhibits refer to the page number of each exhibit, *i.e.*, "CX 12 at 1" refers to the first page of Claimant's Exhibit 12. Page citations to the Employer's

developed a calcified lump which prevented him from opening and closing his hand properly, and on June 19, 2000, he was put out of work by BIW in anticipation of surgery scheduled for August 9, 2000. TR 22, 27-28.

On August 9, 2000, the Claimant underwent surgery by John Van Orden, M.D. to remove a calcified soft tissue mass in his left index finger. CX 9 at 4-5. Dr. Van Orden saw him post-operatively on August 14, 2000, at which time he reported that the Claimant was not ready to use his left hand. EX 15 at 44-45. The Claimant is right handed. TR 27. On August 21, 2000, Dr. Van Orden relaxed the Claimant's work restrictions to allow occasional, which he defined as up to 21 minutes per hour, use of the left hand with no grasping in excess of three pounds. EX 15 at 42-43. There is no dispute that BIW had no work for the Claimant within these restrictions, and he was paid temporary total disability compensation while out of work. TR 13; EX 5 at 1.

On August 27, 2003, the labor organization representing BIW's production employees, including the Claimant, commenced an economic strike against BIW which lasted until October 22, 2000. TR 23-24, 48; EX 13. On September 14, 2000, Dr. Van Orden further relaxed the Claimant's restrictions to allow work with occasional use of his left hand and no grasping of more than ten pounds. EX 15 at 40-41. By letter dated September 27, 2000, Ross M. Nadeau, a BIW workers' compensation claim adjuster, advised the Claimant that here was work available for him within Dr. Van Orden's revised restrictions. Mr. Nedeau's letter states,

> I received Dr. Van Orden's Ml form dated 9-14-00. Based on the Ml form, work would be available for you at BIW. Therefore, your workers' compensation benefits will end as of Sunday, September 24, 2000.
>
> Should you have any questions concerning this please do not hesitate to contact me at 442-1982.

CX 12 at 5. The Claimant acknowledged receiving this letter but testified that neither Mr. Nadeau nor anyone else at BIW ever told him what the available job was. TR 23. He called Mr. Nadeau and asked why the availability of work had changed during the strike and said that Mr. Nadeau told him that "seeing that the strike had continued on that there may be work available, is the way he said it to me." TR 31. The Claimant said that he did not contact anyone in his department at BIW about returning to work during the strike because he was not told to do so. TR 32-33. The Claimant also testified that the reason he did not return to work in response to Mr. Nadeau's letter was not because his union was on strike but rather because he was confused about whether Dr. Van Orden had released him to return to work:

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exhibits, which are "Bates" stamped or sequentially paginated as a package, refer to the Bates stamp page number, *i.e.*, "EX 14 at 23" refers to the 23rd page of the exhibit package which is the first page of Employer's Exhibit 14.

Q. -- right? And I am trying to find out if it's your testimony that you didn't do that because of the strike or if you didn't do that because you didn't think that you were medically released to go back to work?

A. I didn't do it because I didn't believe that I was medically released. I mean he continued on to change my M-l each time he saw me, trying to progressively get me to the point where I could go back to work.

Q. Let me ask you this. Had you understood that you were medically released to go back to work, would have you gone back to work even though Local 6 was on strike?

A. I would have at least made the contact to see what the job was, yes. But I was just under the understanding that, that my doctor, my treating doctor had not done that. So I was kind of confused to be honest with you, when I received the letter.

TR 33-34. The Claimant also testified that there would have been consequences had he chosen to cross his union's picket line to report for work at BIW during the strike:

> Well, basically if I had crossed the picket line and then later needed representation, things would have been more difficult because at that point once the strike had ended, I would have had to have gone back and worked hand and hand with these people. So I would have been kind of double crossing them then, later on having to work hand and hand with them.

TR 43. The Claimant returned to work on October 23, 2000, the day after the strike ended. TR 24. No changes were made in his work restrictions between September 14, 2000 and the end of the strike, and the Claimant acknowledged under cross-examination that the only real change that occurred between September 14, 2000 and October 22, 2000 was the end of the strike. TR 34-35. However, the Claimant testified that after the strike, all work limitations that had been previously approved for employees were canceled and had to be evaluated and approved anew. TR 24. He was initially assigned to his pre-injury job but was placed through BIW's alternate work program ("49-10") in a light duty assignment after Dr. Van Orden faxed a progress note on October 26, 2000, stating that the Claimant had sharp pain with grasping or lifting and occasional numbness with repetitive use but could work with limits. TR 24-25; EX 15 at 38-39. After returning to work, the Claimant developed complications with his left index finger which necessitated a second surgical procedure and loss of work time which is not at issue herein. TR 37-38. At the time of the hearing, the Claimant was working four hours per day and receiving partial disability compensation. TR 38.

BIW called Albert James Gleason, III, a craft administrator, to testify regarding the work that would have been available to the Claimant had he reported to work during the strike in response to Mr. Nadeau's September 27, 2000 letter. Mr. Gleason stated that his responsibilities

included administering the union contract for the tinsmith trade, disciplining employees for absenteeism or rules violations, reviewing work capacities and assigning jobs to employees with work restrictions. TR 47. Mr. Gleason testified that he had first-hand, personal knowledge that there was light duty work available at BIW during the strike and that the shipyard remained open for work. TR 48-50. He stated that the work performed during the strike was primarily "trial card" work aboard a finished ship to correct discrepancies noted by the customer. TR 50. In response to a question as to whether there was work available at BIW within the restrictions written by Dr. Van Orden on September 14, 2000, Mr. Gleason testified,

> Well, from my own personal experience, the work that I was performing, for example, was either brush painting or cosmetic preparation for compartments to turn over to the navy, removal of paint spatter with either steel wool or some other form of rubbing. We cleaned the bright work basically, bells and those type of things that were paint spattered during construction. We cleaned compartments, swept and vacuumed and make the ship ready for the customer.

TR 51. He further testified that had the Claimant elected to return to work, he would have had to report to the employment office per the instructions issued to all employees in a pre-strike letter from the BIW's Vice President for Human Resources (EX 13) and that he "would have been given a job based on whatever his physical capabilities were at the time. TR 51. Mr. Gleason stated that he was aware of one employee in the Claimant's bargaining unit who crossed the picket line to work during the strike and who continued to work after the strike ended. TR 51-52. Although the alternate work program ("49-10"), which placed the Claimant in a light duty assignment after the strike, was not operating during the strike, Mr. Gleason insisted that there was light duty work available which the Claimant could have performed within his restrictions on a full-time basis and at his regular rate of pay during the strike. TR 52-59.

B. The Claimant's Entitlement to Disability Benefits During the Strike

The Claimant argues that his entitlement to temporary total disability benefits should be analyzed in the same manner as any other case where an employee is incapacitated by a workplace injury – that is, whether he could have returned to his usual, pre-injury employment and, if not, whether BIW has shown that there was suitable alternative employment available to him. Claimant's Post-hearing Brief at 4-5. The Claimant asserts that he prevails under this analysis because the evidence clearly shows that he was not able to return to his pre-injury job as a tinsmith and because BIW has not demonstrated that there was suitable alternative employment available. On this latter point, the Claimant contends that BIW's attempt to establish the availability of suitable alternative employment through Mr. Nadeau's letter and the testimony of Mr. Gleason must fail as no job was ever identified with sufficient specificity to allow an evaluation of its suitability. *Id*. at 5-6. Moreover, the Claimant points out, he was never actually offered any job during the strike since BIW only informed him through Mr. Nadeau's letter that his compensation had been terminated on the ground that work was available during the strike within Dr. Van Orden's September 14, 2000 restrictions. *Id*. at 6-7. Finally, the Claimant

alternatively argues that any job that requires an employee to put himself in physical danger by crossing a union picket line should not be considered reasonably available. *Id*. at 7.

BIW, on the other hand, sees the strike as the central issue in this case, asserting that the Claimant's participation in the strike amounts to a rejection of suitable alternative employment which, combined with his failure to look for other work during the strike, requires a denial of benefits:

> A claimant, who voluntarily leaves work to participate in a strike, should not be treated any differently than a claimant in any other situation. The purpose of the Longshore Act is to attempt to put a Claimant in the position he or she was in before the injury; it was not designed to put a Claimant in a better position, nor is its purpose to advance the position of an injured worker beyond that of his uninjured colleagues. To allow benefits to continue for a Claimant who voluntarily participates in a strike would do precisely that. The uninjured workers participating in a strike do so with knowledge and expectation that, during the striking period, they will not receive compensation from the employer against whom the strike was organized. By the same token, a claimant who voluntarily leaves work to participate in a strike should do so under the same conditions and without expectation that he or she will receive any compensation during the period of his or her participation. As a matter of course, therefore, a claimant who, like the employee in this case, is released to work but refuses to return when invited to do so should not be deemed entitled to receive Longshore-Act benefits while he or she is out on strike.

BIW Post-hearing Brief at 4. In addition to its general contention that a claimant should not be allowed to continue to receive compensation benefits under the Act during a strike, BIW argues that the particular facts of this case require denial of the claim because "it is undisputed that (1) the Claimant had been released to work with restrictions; (2) that, in September 2000, the Employer offered the Claimant suitable alternate employment at BIW that paid him wages meeting his pre-injury wage; (4) the Claimant did not accept the offer; and (5) when the strike ended, he returned to work doing alternate work of the nature that would have been available to him during the strike." *Id*. at 5. BIW contends that it is significant that nothing in the Claimant's work restrictions changed between September 14, 2000 and October 23, 2000 when he returned to work at the conclusion of the strike, and it asserts that the evidence shows that the Claimant refused the suitable employment it offered "solely to participate in the strike." *Id*. at 5. BIW further argues that the Claimant should be denied compensation during the strike because he made no effort to look for suitable employment in his community while he was out of work. *Id*. at 5-6.

BIW's brief also contains an excellent discussion of the limited body of case law addressing the impact of a strike on benefits under the Act, including *Schenker v. Washington Post Co.*, 7 BRBS 34 (1977) (*Schenker*) where the Benefits Review Board held that an injured worker was entitled to continue receiving previously awarded permanent partial disability benefits during a strike. BIW argues that the Board's holding in *Schenker* is premised on a faulty legal

analysis and should be rejected in favor of a rule barring benefits to any employee who voluntarily participates in a strike. *Id.* at 6-9. Alternatively, BIW contends that the claim in this case should be denied as the instant facts are distinguishable from those considered by the Board in *Schenker,* and it suggests that if a general rule barring benefits to striking workers is not adopted in favor of the fact-based analysis affirmed by the Board in *Vinson v. Newport News Shipbuilding and Dry Dock Co.*, BRB No. 1204 (Sept. 19, 2001) (*per curiam*) (unpublished) (*Vinson*), the instant claim should be denied because it has shown that suitable alternative employment was available to the Claimant during the strike. *Id.* at 8-9.

As a general proposition, I agree with BIW's statement that the purpose of the Act is to attempt to restore an injured worker to his or her pre-injury position and not to place the injured worker in a better position than the worker's uninjured colleagues. However, I do not read *Schenker,* as BIW does, to hold that voluntary strikers are "automatically" entitled to continued benefits under the Act. In *Schenker,* the Board held that an injured worker who suffered a permanent partial disability prior to participating in an economic strike was entitled to continue receiving benefits during the strike:

> [T]he Board believes that in the factual setting of this case it is clear that the claimant should receive benefits during the strike. We note that the claimant was injured on June 23, 1974, he filed a claim sometime before June of 1975, and the strike started in October of 1975. Thus, though the claimant may have voluntarily withdrawn from the labor market by going on strike, his wage-earning capacity diminished before the strike and continues afterward. It is the loss of such capacity, not loss of present earnings, which is compensated. Furthermore, had the claimant continued to work for the employer, he would have been entitled to benefits. Thus, it makes no difference here whether the pressman's union struck the employer's facility.

7 BRBS at 39 (underlining in original). *See also Pickett v. Newport News Shipbuilding and Dry Dock Co.*, Case Nos. 2000-LHC-00145 & 2000-LHC-00146 (ALJ Sept. 6, 2000).[2] As the above-quoted language clearly reflects, *Schenker* contains no automatic rule of entitlement, nor does it attempt to place the injured worker in a better position than his or her uninjured peers. Rather, the Board's holding was based on the particular facts of the case which showed that the Claimant had been found entitled to permanent partial disability compensation for his loss of wage-earning capacity prior to the strike and that he would have been entitled to receive those benefits even if he had continued to work. Under those circumstances, the Board found that it was irrelevant whether the claimant continued to work or voluntarily participated in the strike and, in so holding, neither rewarded nor penalized the worker for striking, a result that is entirely consistent with the Board's approach to other voluntary withdrawals from work. *See Hoopes v.*

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[2] In *Pickett,* an unpublished decision cited by BIW in its closing argument that was not appealed, Administrative Law Judge Daniel J. Sarno, relying on *Schenker,* held that an injured worker, who had been receiving voluntary payments of compensation for lost overtime opportunities prior to an economic strike, was entitled to "the same loss in wage earning capacity compensation during the strike that he was receiving just prior to the strike." Slip op. at 4.

Todd Shipyards Corp., 16 BRBS 160, 162 (1984) (worker who establishes entitlement to permanent partial disability compensation for loss of wage-earning capacity and subsequently withdraws from the workforce to be at home with her dependent child does not lose her entitlement).

That said, I find that *Schenker* does not control the outcome in this case because the facts are materially distinguishable. Here, the Claimant was receiving temporary total disability compensation prior to the strike, and there is no dispute that his entitlement to such compensation would have terminated had he returned to work at his pre-injury wage level. In this factual setting, the question of whether he could have returned to work during the strike is not irrelevant but critical to a determination on his continuing compensation entitlement. Since it is also undisputed that the Claimant could not have returned to his pre-injury job as a tinsmith during the strike, the issue is, as it was in *Vinson*, whether BIW established that suitable alternative employment was available to the Claimant during the disputed period of the strike when his compensation was suspended. On this record, I find that BIW has not made the requisite showing.

An employer seeking to avoid compensation liability to an injured worker who is unable to return to his or her usual, pre-injury employment must demonstrate the availability of suitable alternative employment or realistic job opportunities which the Claimant is capable of performing and which he could secure if he diligently tried. *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 779 (1st Cir. 1979).[3] *See also Palombo v. Director, OWCP*, 937 F.2d 70, 73 (2nd Cir. 1991) (*Palombo*); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981) (*Gulfwide Stevedores*); *Dixon v. John J. McMullen and Assoc.*, 19 BRBS 243, 245-46 (1986). BIW has not attempted to show that suitable work was generally available outside of its shipyard during the strike, but it contends that it discharged its obligations by offering the Claimant suitable light duty work during the strike. BIW correctly argues that an employer can satisfy its burden to demonstrate the availability of suitable alternative employment by offering light duty work within an injured worker's restrictions, provided that the work to be performed is necessary and not merely the creation of a beneficent employer. *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224, 226 (1986); *Swain v. Bath Iron Works Corp.*, 17 BRBS 145, 147 (1985). The problem I find with BIW's argument is the absence of any valid offer of light duty work.

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[3] In *Air America*, the First Circuit rejected "a mechanical rule . . . that the employer must always demonstrate the availability of an actual job opportunity whenever a claimant shows an inability to perform his previous work" and held that such a showing is required "when a claimant's inability to perform any available work seems probable, in light of claimant's physical condition and other circumstances such as claimant's age, education, and work experience . . . [but not] [w]here claimant's medical impairment affects only a specialized skill that is necessary in his former employment . . . . " 597 F.2d at 779. The record in this case contains no information about the Claimant's education and prior work experience. However, BIW has not argued that the *Air America* exception to the general rule regarding an employer's suitable alternative employment burden is applicable, and it concedes that it must show "the general availability of realistic job opportunities involving work which claimant is capable of performing." BIW Post-hearing Brief at 4, quoting *Dionisopoulos v. Pappas & Sons*, 16 BRBS 93, 96 (1994).

First, the record shows that BIW did not "offer" any light duty job to the Claimant. Rather, it notified him in Mr. Nadeau's letter of September 27, 2000 that his compensation had been suspended three days earlier because "work would be available for you at BIW" within the restrictions identified by Dr. Van Orden on September 14, 2000. CX 12 at 5. Second, the record shows that BIW's alternate work program, in which that the Claimant was placed upon his to work after the strike on October 23, 2000 for evaluation of his restrictions and identification of suitable light duty work, was not in operation during the strike. On these facts, I conclude that BIW has failed to meet its burden of offering light duty work within the Claimant's restrictions. In my view, a valid offer of light duty work should be made before an employee's compensation is suspended, and it should either identify a specific job or offer assignment to an alternate work program where the injured worker's restrictions could be evaluated and suitable light duties identified.

Based on the foregoing, I conclude that the Claimant is entitled to an award of temporary total disability compensation from September 25, 2000 through October 22, 2000 because BIW failed to show that suitable alternative employment was available. In making this determination, I reject BIW's argument that the Claimant forfeits any compensation entitlement because he failed to show that he diligently looked for work during the strike. An employee's diligence in attempting to secure alternate employment only comes into play when the employer meets its initial burden of showing that suitable alternative employment is available. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 691 (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986). Here, BIW failed to meet its initial burden, so the Claimant's diligence is irrelevant.

C. Interest on Unpaid Compensation

Although not specifically authorized in the Act, the Benefits Review Board and the Courts have consistently upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225, 1228-30 (5th Cir.1971); *Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *rehearing denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979); *Santos v. General Dynamics Corp.*, 22 BRBS 226 (1989). Interest is due on all unpaid compensation. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 84 (1989). The Board has also concluded that inflationary trends in the economy render use of a fixed interest rate inappropriate to further the purpose of making claimant whole, and it has held that interest should be assessed according to the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982) which is the rate periodically changed to reflect the yield on United States Treasury Bills. *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). My order incorporates 28 U.S.C. §1961 (1982) by reference and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

D. Attorney's Fees

Having successfully established his right to compensation, the Claimant is entitled to an award of attorneys' fees under section 28 of the Act. *Lebel v. Bath Iron Works*, 544 F.2d 1112, 1113 (1st Cir. 1976). The Claimant's attorney has filed an itemized application for attorney's fees and expenses for work performed before the Office of Administrative Law Judges in the amounts of $3,358.50 and $778.10, respectively, for a total of $4,136.60. BIW has not filed any objection to the fee application.

Upon review, I find that the fee application complies with the requirements of 20 C.F.R. §702.132(a) and that the fees and costs requested are reasonably commensurate with the necessary work done, taking into account the quality of representation, the complexity of the legal issues involved and the amount of benefits awarded. Accordingly, I will order BIW to pay the Claimant's attorney fees and expenses in the amount of $4,136.60.

IV. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the following order is entered:

(1) The Employer, Bath Iron Works Corporation, shall pay to the Claimant, Kevin L. Kirk, temporary total disability compensation pursuant to 33 U.S.C. § 908(b) based upon the average weekly wage of $618.19 commencing September 25, 2000 through October 22, 2000;

(2) The Employer shall pay the Claimant interest on any past due compensation benefits at the Treasury Bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid;

(3) The Employer shall pay the Claimant's attorney, Marcia J. Cleveland, fees and costs in the in the amount of $4,136.60; and

(4) All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts
DFS:dmd